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Supreme Court of the United States

October Term, 1943

No. 727

ARTHUR G. VESCELIUS, Trustee in Bankruptcy of River Edge Estates, Inc.,

Petitioner,

vs.

ABRAHAM A. WEDEEN, Assignee for the Benefit of Creditors of Jamaica Concrete Corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Leo Guzik,
Joel Gross,
Of Counsel for Respondent.

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It is apparent from the Petition for *Writ of Certiorari* that the petitioner has entirely misconceived the purpose of the Writ. The petitioner seeks to have this Court review not only the questions of law involved in this cause, but also (1) the findings of fact in favor of the respondent by both the District Court and the Circuit Court of Appeals; (2) the denial by the Circuit Court of Appeals of the petitioner's application to "correct" the record before said Court; (3) the denial by the District Court and the Circuit Court of Appeals of his application for interlocutory relief pending the determination of his appeal to the Circuit Court of Appeals. The petitioner's argument on these issues is susceptible of much correction and reply in point of fact and law. It is, however, so well established that *Certiorari* will not be granted to review

matters of this character pertaining to questions of fact, the state of the record, and the propriety of *ad interim* relief, that it would serve no purpose for us to treat such issues herein.

> "Applications of decisions to peculiar and debatable sets of fact; insistence that the facts are otherwise than the lower courts found them to be—these are the recurrent characteristics of unsuccessful petitions."
>
> *Supreme Court at October Term, 1933*, by Felix Frankfurter and Henry M. Hart, Jr., 48 Harv. L. R. 238, 273;
>
> *Layne & Bowler Corporation* v. *Western Well Works, Inc.*, 261 U. S. 387 (1923);
>
> *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163 (1923);
>
> *Southern Power Co.* v. *Public Service Co.*, 263 U. S. 509 (1923).

We will take issue with the petitioner on his assertion that the decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court. This contention is the sole reason assigned by the petitioner for the granting of the Writ which falls within "the character of reasons which will be considered" (Supreme Court Rule No. 38 (5)) in support of a petition for a *Writ of Certiorari.*

The Facts

We deem it necessary to state the facts because the petitioner's "Summary Statement of Matters Involved" sets forth, argumentatively, matters that are not grounded in the Record. (To illustrate: the last 9 lines on page 2). *Furness, Withy & Co.* v. *Yang Tsze Ins. Assn.*, 242 U. S. 430 (1916).

In June of 1940, more than ten months prior to the commencement of this bankruptcy proceeding, a bill of complaint was filed in the Court of Chancery of New Jersey seeking to enforce a constructive trust in certain specific real property purchased in the name of the defendant named in said suit, River Edge Estates, Inc., with funds of the complainant, Jamaica Concrete Corporation. (Bill of Complaint, R. p. 27). Concurrently with the filing of the bill of complaint a *lis pendens* was filed in the Office of the County Clerk of Bergen County giving notice of the claim made by Jamaica Concrete Corporation to the said real property. The property was described by metes and bounds in both the bill of complaint and the *lis pendens* (R. p. 36).

The New Jersey Lis Pendens Act (R. p. 40) provides for the discharge of real estate from the claim made against it upon the deposit of sufficient security.

On June 17th, 1940, pursuant to said statute, an order was made in the said chancery proceeding, reciting that the defendant offered to pay into the said court the sum of $12,500.00 and that "the security given by the defendant by the payment into court of the monies aforesaid was sufficient security to pay such sum of money as may, by the final determination of the cause, be ascertained to be chargeable upon the affected real property", and directing that said real estate be discharged from the claim of the complainant (Amended Order of June 17th, 1940, R. p. 37).

On February 11th, 1941 all parties having duly filed pleadings by their respective solicitors bringing the matter to issue, the cause came on for final hearing before the Honorable Charles M. Egan, Vice Chancellor of the Court of Chancery of New Jersey. The defendant, River Edge Estates, Inc., through its counsel, William J. Morrison, Jr., of the firm of Morrison, Lloyd and Morrison, contested the relief sought by the complainant.

On March 31st, 1941, Vice Chancellor Egan filed his opinion in which he concluded that the monies of the complainant had been traced to the property of the defendant and that the real property of the defendant, and therefore the fund deposited in its place, were held in trust by River Edge Estates, Inc., a defendant in said suit named, for the benefit of the complainant, and that said property and fund should be impressed with a constructive trust and equitable lien; and on May 8th, 1941, Vice Chancellor Egan entered a formal decree in accordance with his said opinion. An appeal lies from a decree of the Court of Chancery to the Court of Errors and Appeals of New Jersey (*N. J. R. S.* 2:29-117). No appeal was perfected therefrom and the decree became a final adjudication, unless the same can be collaterally reviewed, as the petitioner is attempting to have it reviewed.

On April 24th, 1941, after the opinion had been filed in the Court of Chancery, but before the entry of the formal decree, an involuntary petition in bankruptcy was filed against River Edge Estates, Inc. (R. p. 2). The said corporation was adjudicated bankrupt on May 21st, 1941 (R. p. 2). On July 31st, 1941, the trustee in bankruptcy, the petitioner herein, filed with the Referee in Bankruptcy a petition in which he asserted a claim to the fund on deposit with the Clerk of the Court of Chancery (R. p. 3). The respondent herein, in answer to the order to show cause issued on said petition, appeared specially and challenged the jurisdiction of the Court of Bankruptcy to determine the rights of the respective parties in the fund which had already been adjudged to be the property of Jamaica Concrete Corporation, the complainant in the said chancery proceeding (R. p. 3).

On December 20th, 1941, seven months after the filing of the chancery decree, the Referee in Bankruptcy entered an order reciting among other things that the question of the ownership of the fund on deposit "and the propriety and validity of the said decree" is pending for deter-

mination by the Bankruptcy Court and restraining and enjoining the respondent herein and his counsel from taking any proceedings of whatsoever kind and character in the Court of Chancery in the aforementioned chancery proceeding (R. p. 7). The District Court reversed the Referee's order (Opinion R. p. 19; Order R. p. 22) and the Circuit Court of Appeals affirmed said reversal (R. p. 57).

On May 28th, 1941 a petition in reclamation was filed with the Referee in Bankruptcy signed by one, David H. Harris, as attorney for Jamaica Concrete Corporation, seeking an order compelling the bankruptcy receivers to turn over to Jamaica Concrete Corporation the property in their possession (R. p. 2).

On March 23rd, 1942 an order was entered by the Referee in Bankruptcy overruling the special appearance of the respondent, denying the application of David H. Harris for the amendment and dismissal of said reclamation petition, and directing the trustee "to make application to intervene in, and become a party to, the proceedings pending in the Court of Chancery of New Jersey, and to present such evidence as he may deem material and to take all proceedings in said cause as may be necessary or advisable for the protection and adjudication of the rights of the trustee" (R. p. 17). Insofar as the said order overruled the said special appearance and denied the amendment and dismissal of the said reclamation petition, the same was reversed by the District Court. Insofar as the said order directed the trustee to intervene in the Chancery proceedings the said order remains in full force and effect (R. p. 23). The said order of reversal was affirmed by the Circuit Court of Appeals (R. p. 57).

An order was entered in said chancery proceeding on petitioner's ex parte application on April 1st, 1942, granting leave to the petitioner to intervene and become a party to the said chancery proceeding. On April 10th, 1942, on petitioner's ex parte application an order was entered

in said chancery proceeding vacating the said order of April 1st, 1942 (R. p. 44).

The District Court, affirmed *per curiam* by the Circuit Court of Appeals, held that the Court of Chancery of New Jersey having acquired jurisdiction of the parties and actual possession of the property as security in a suit in rem to enforce a constructive trust more than ten months before the commencement of the bankruptcy proceeding, was not divested of its authority to adjudicate the controversy pending before it by the bankruptcy of the defendant (R. p. 19). The petitioner contends that the Referee in Bankruptcy as well as the District Court and the Circuit Court of Appeals, erred, and that the Bankruptcy Court had "exclusive, non-delegable jurisdiction" in the premises.

We will not set forth at length the facts with respect to the reclamation petition filed with the Referee in Bankruptcy allegedly on behalf of Jamaica Concrete Corporation, except to state that both Courts below have adjudged the fact to be that said petition was filed without the authority of Jamaica Concrete Corporation, and have ruled that the same should be dismissed; and it is well settled that this Court will not on *Certiorari* review such finding of fact.

Argument

The decisions of the Supreme Court of the United States, as well as those of the lower Federal courts are uniform in holding that the jurisdiction of a court over a suit *in rem* affecting specific property, where the court has acquired possession of the property involved more than four months prior to the bankruptcy of the defendant, is not superseded by such bankruptcy proceeding and that the Bankruptcy Court lacks the power to wrest possession of the property and jurisdiction of the suit from the court first assuming jurisdiction.

It is not open to question that the bill of complaint in the Court of Chancery claimed specific property by reason of a constructive trust which arose in February and in May of 1940 (R. p. 27). It is likewise an admitted fact that by virtue of the filing of the bill of complaint and *lis pendens* and the deposit of funds pursuant to the amended order of June 17th, 1940 (R. p. 37), the Court of Chancery acquired actual possession of the *res* in such manner as to render such decree as it might make binding upon all persons claiming an interest through the defendant (*N. J. R.S.* 2:26-28, R. p. 40). As we have observed, the bankruptcy of the defendant, River Edge Estates, Inc., occurred more than ten months after the bill of complaint and lis pendens had been filed and deposit made of the fund in question.

The reported decisions are unanimous in holding that where a court acquires jurisdiction over a *res* more than four months prior to the commencement of the bankruptcy proceeding, and even where a court acquires jurisdiction over a *res* within four months prior to the bankruptcy proceeding in a suit to enforce a lien antedating said four months period, the court having jurisdiction of the *res* has exclusive jurisdiction to determine rights therein; that

its jurisdiction is not superseded by the Bankruptcy Court; and that the Bankruptcy Court lacks the power to exercise any authority in respect to the *res* or to the prior proceeding (except, perhaps, to grant a temporary stay in order to afford the trustee an opportunity to enter an appearance in the prior proceeding); and in particular, lacks the power to restrain the other proceeding. In such cases, the occurrence of bankruptcy has no effect upon the pending proceeding. *This is the holding of all of the applicable decisions. There is no conflict of authority.*

Metcalf v. *Barker,* 187 U. S. 165 (1902);
Pickens v. *Roy,* 187 U. S. 177 (1902);
Straton v. *New,* 283 U. S. 318 (1931);
Bryan v. *Speakman,* 53 F. (2d) 463 c. d. 285 U. S. 839 (1931);
Penn General Casualty Co. v. *Pennsylvania,* 294 U. S. 189 (1934);
In re Hoey, Tilden & Co., 292 Fed. 269 (S. D. N. Y. 1922);
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Tennessee Producer Marble Co. v. *Grant,* 135 Fed. 322 (C. C. A. 3, 1905);
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In re Cherokee Public Service Co., 20 F. Supp. 195 (D. C. Ark., 1937);
Union Joint Stock Land Bank v. *Byers*, 100 F. (2d) 82 (C. C. A. 3, 1938);
Dannell v. *Wilson-Weesner-Wilkinson Co.*, 109 F. (2d) 364 (C. C. A. 6, 1940).

In the case *sub judice*, the Court of Chancery acquired *actual possession* of the *res* more than ten months prior to the commencement of the bankruptcy proceeding. The suit was one to enforce a lien which arose over a year prior to the commencement of the bankruptcy proceeding. Under these circumstances, the District Court, in giving effect to the applicable decisions of this Court and of lower Federal Courts, could not have ruled otherwise than it did—that the jurisdiction of the Court of Chancery was neither impaired nor destroyed by the initiation of the bankruptcy proceeding. So squarely in conformity with the well established rule of decision on the facts involved herein was the decision of the District Court, that the learned Circuit Court of Appeals affirmed *per curiam* on its opinion, and within a few days of the argument of the appeal.

The petitioner apparently contends that the decision below is in conflict with the following decisions by this Court:

Taylor v. *Sternberg*, 293 U. S. 470 (1935);
Pepper v. *Litton*, 308 U. S. 295 (1939);
Thompson v. *Magnolia Petroleum Co.*, 309 U. S. 478 (1939);
Whitney v. *Wenman*, 198 U. S. 539 (1905).

An examination of the cited cases discloses each of them to involve a factual situation completely distinguishable from that in the case *sub judice*, and, for very obvious reasons, requiring the application of a distinct line of precedents.

Taylor v. *Sternberg, supra,* involved state court proceedings had pursuant to state insolvency statutes, and of course, it was held that the bankruptcy proceeding superseded the state insolvency proceeding. The Court of Chancery proceeding in the case *sub judice* was not in any wise an insolvency proceeding; nor does the appellant contend that it was such a proceeding.

Pepper v. *Litton, supra,* in the language of the Supreme Court, presented

> "the question of the power of the Bankruptcy Court to disallow, either as a secured or as a general or unsecured claim, a judgment obtained by the dominant or controlling stockholder of the bankrupt corporation on alleged salary claims".

This case does not involve that question at all. The default judgment recovered by the dominant stockholder dealt with in *Pepper* v. *Litton* was obtained by fraud and collusion. The decree of the Court of Chancery in the case *sub judice* was not obtained by confession or default, but, on the contrary, after contested litigation and a final hearing on the merits; nor was there, nor could there be, the faintest suggestion of fraud in the procurement of said decree.

Thompson v. *Magnolia Petroleum Co., supra,* affirmed the jurisdiction of the Bankruptcy Court upon the finding of fact that the trustee was in "actual possession of the property". In the case *sub judice,* the situation was precisely the reverse, the property being in the actual possession of the Court of Chancery (as security for the claim of the complainant in the proceeding pending therein). Yet, even in *Thompson* v. *Magnolia Petroleum Co.,* this Court concluded that it was desirable to have the litigation proceed in the State Courts of Illinois.

Whitney v. *Wenman, supra*, did not involve a conflict of jurisdiction. It was there found as a fact that a lease made by the bankrupt of premises in which certain of its property was located was collusive and that, therefore, the property was in the constructive possession of the bankrupt.

It is clear that the fund in question, having been deposited with the Clerk in Chancery more than ten months before the commencement of the bankruptcy proceeding, in substitution of the *lis pendens* and as security for the satisfaction of the claim of complainant, did not remain in the constructive possession of the bankrupt. The petitioner's contention to the contrary is without basis. Equally without justification is the petitioner's assertion that the complainant had no lien upon the moneys deposited for the express purpose of securing payment of the complainant's claim (R. p. 37).

We respectfully submit that there is no conflict of decision to be resolved herein, and that the applicable decisions uniformly support the determination of the District Court and the Circuit Court of Appeals below. The matter is one turning upon the facts of the particular case and raises no questions of public interest. There is, in the language of Chief Justice Hughes "an utter absence of any good reason for asking" for a *Writ of Certiorari*. The petition, therefore, should be denied, with costs.

Respectfully submitted,

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